United States Court of Appeals

for the Second Circuit

APPENDIX

75-4249

76-4009

United States Court of Appeals

FOR THE SECOND CIRCUIT

RALPH CAPUTO, Claimant,

—and—

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, United States Department of Labor,

Respondents,

—against—

NORTHEAST MARINE TERMINAL COMPANY, INC., Employer,

—and—

STATE INSURANCE FUND, Carrier,

Petitioners.

B/S

BRIEF FOR RESPONDENT, RALPH CAPUTO, AND SUPPLEMENTAL APPENDIX

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BRIEF FOR RESPONDENT, RALPH CAPUTO,

Issue

The Respondent agrees with Petitioners on the issue presented for decision and the first paragraph of their Statement at page two of its brief.

Counterstatement of Facts

The Petitioners' Statement of Facts does not reveal the complete relationship between the Respondent, Ralph Caputo, hereinafter referred to as the claimant, and the Petitioner, Northeast Marine Terminal Co., Inc., hereinafter referred to as the employer.

The claimant was not hired as a warehouseman, he was hired as terminal labor—longshoreman (S.A. 1). His duties in this capacity requires him to load and unload trucks, containers, lighters and ships stores (S.A. 2, 3). He is a member of the International Longshoremen's Association (S.A. 3). The claimant was regularly employed by Pittston Stevedoring Corporation, but when there is no work at Pittston, he shapes-up (S.A. 4), and takes a job as a longshoreman wherever it is available (S.A. 5). On the date of the accident, the claimant was hired as terminal labor by Northeast Marine Terminal Company, Inc. At the time of the injury, the claimant was loading a consignee's truck with cargo that had been unloaded from the Yugoslav ship, Alexander (by stipulation and S.A. 6, 7), about five days prior, and maintained by the employer within the terminal area until picked-up by the consignee's truckman. The claimant could be assigned to loading a truck in the morning and a lighter or ship later the same day (S.A. 6, 8). The claimant was working with a checker at the time of injury (S.A. 9, 10).

Jurisdictional Statutes Involved

The Longshoremen's and Harbor Workers' Compensation Act as amended November 26, 1972 (hereinafter referred to as the Act, 33 U.S.C. 901 et seq.), with particular reference to 902(3), 902(4), 903(a), 920, and 921(b)(3).

ARGUMENT

POINT I

Under the law the presumptions are in favor of the claimant.

33 U.S.C. 920 of the Longshoremen's and Harbor Workers' Compensation Act, hereinafter referred to as the Act, creates a presumption of jurisdiction in favor of the claimant. It is not enough to merely create a doubt. Doubts including factual are to be resolved in favor of the claimant, *Friend* v. *Britton,* 220 F.2d 820, D.C. Cir. 1955; *Beasley* v. *O'Hearne,* 250 Fed. Supp. 49 (S.D. W. Va. 1966). The employer herein did not produce any evidence to controvert this claim. It relied on cross examination of the claimant. Said cross examination did not produce any evidence to controvert the jurisdictional issue.

POINT II

The construction of a statute by the agency charged with its enforcement is entitled to great weight.

Section 939 of the Act places the administration of the statute under the Secretary of Labor and gives him the authority to make such rules and regulations in order to effectuate the purposes of the Act. The purpose of creating a specific administrative agency to handle a specialized problem cannot be denied. In this particular case, the Benefits Review Board members were selected by the Secretary of Labor 33 U.S.C. 921(b)(1), one from industry, one from labor, and one neutral, it being the intention to create an

expert panel with knowledge in the field. For this reason, the courts have consistently held that great weight should be afforded to the agency charged with the enforcement of a particular statute. *NLRB* v. *Boeing,* 421 U.S. 67 (1973); *Brennan* v. *Prince William Hospital,* 503 Fed. 2d 282 (4th Cir. 1974); *Nacirema Operating Company* v. *Oosting,* 456 Fed. 2d 956 (4th Cir. 1972). All of the latter cases hold that while the interpretation of the administration agency is not controlling on the courts, it is nevertheless entitled to great weight.

The Benefits Review Board has rendered numerous decisions involving the loading and unloading of vessels and the loading and unloading of containers, which are used in carrying cargo aboard vessels. It has consistently held in all of these decisions that until such time as a terminal operator and/or stevedoring corporation delivers cargo to a consignee, it is performing acts which are part and parcel of the unloading process of a vessel, therefore, its employees injured in the course of performing this activity are engaged in maritime service. The Benefits Review Board has consistently rejected the point of rest theory advanced by the employers herein. The Board has held that the area wherein the employee is injured must be an area adjoining navigable waters of the United States, or an area customarily used in the loading and unloading of vessels; that the loading and unloading of ships is a continuous process accomplished by the employees working in various parts of the marine terminal in the handling of cargo; that the final act of unloading is not accomplished until the cargo is delivered to the consignee's truckman, who arrives within the terminal area for that purpose. A

few of the leading cases decided by the Board on this point are as follows:

Dellaventura v. *Pittston Stevedoring Corp.*, 2 BRBS 340, October, 1975;

Battista v. *Atlantic Container Lines, Ltd.*, 2 BRBS 193, August 22, 1975;

Spataro v. *Pittston Stevedoring Corp.*, 2 BRBS 122, August, 1975;

Mininni v. *Pittston Stevedoring Corp.*, 1 BRBS 428, May, 1975;

Coppolino v. *I. T. O., Inc.*, 1 BRBS 205, December, 1974;

Avvento v. *Hellenic Lines, Ltd.*, 1 BRBS 174, November, 1974.

The Benefits Review Board continues to find jurisdiction arising under similar circumstances to be covered under the Act, notwithstanding the 4th Circuit Court of Appeals' decision in *I. T. O. Corporation of Baltimore* v. *Atkins*, decided December 22, 1975, relied upon by the petitioner herein. In a recent decision, *Cabrera* v. *Maher Terminals, Inc.*, 3 BRBS 297, the Board stated that it has determined that its interpretation of the status requirement is in accord with the intent of the 1972 amendments of the Act, and will adhere to that interpretation, notwithstanding the decision of the 4th Circuit in the *Atkins* case, *supra*.

POINT III

Section 921(b)(3) provides that the findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole.

Under the old Act, Section 921(b) provided that review of compensation orders be made to the Federal District Courts. The scope of the review by the Federal District Courts was strictly limited. If the record contained evidence substantiating the finding of fact, as made in the decision under review, then the District Court would not disturb such a finding. *O'Keefe* v. *Smith, Hinchman and Grylls Assoc., Inc.,* 380 U.S. 359 (1965); *Wheatley* v. *Adler,* 407 F.2d 307 (D.C. Cir. 1968); *Potenza* v. *United Terminals, Inc.,* —— F.2d —— (2d Cir. 1975). In effect, the Benefits Review Board has replaced the U. S. District Courts as an appeal tribunal for any party aggrieved by an order of an Administrative Law Judge. Although there has been some change in the appeal process under the new Act, nevertheless, case law as established prior to the amendment is still valid and the reviewing courts are similarly limited in the scope of their review. Questions of fact that have been decided by the Board are to be conclusive if substantiated by the record, 33 U.S.C. 921(b)(3); *Cardillo* v. *Liberty Mutual Insurance Company,* 330 U.S. 469 (1947); *Wheatley* v. *Adler, supra; Wolf* v. *Britton,* 329 Fed. 2d 181 (D.C. Cir. 1964). A review of the evidence contained in the transcript herein fully substantiates that the finding of fact that the claimant was injured in the course of maritime employment in an area adjoining upon navigable waters of the United

States is a valid finding made by the Administrative Law Judge (1a-5a), and reiterated by the Benefits Review Board (6a-9a), and, therefore, it is conclusive and binding upon any appeals court.

POINT IV

Northeast Marine Terminals Company, Inc., is not in the warehousing business.

The employer constantly refers to the claimant as a warehouseman, thereby inferring that is is engaged in the warehousing and storage business, as well as in a marine terminal operation. The employer is not in the warehousing business in the New York area, and never has been in said business. Its sole business operations are the loading and unloading of vessels and the loading and unloading of containers that are used in conjunction with today's modern methods of shipping cargo.

The employer must arrange for the consignee to remove his cargo from within the terminal area as quickly as possible in order to make room for cargo that is constantly being unloaded from ships as well as receive cargo that must be loaded on ships. The operation is not any different in this respect than a post office. Like the employer, the post office is only a temporary holding place pending delivery to the addressee. The storage area of the terminal operator is not a warehouse, no more than a post office.

POINT V

The amended Act intended to cover all longshoremen working within the terminal area as well as checkers.

Under the old Act (before the amendment effective November 26, 1972), shore based activity was not covered under the federal compensation law. There followed a long line of controverted cases on the issue of interpretation of who was covered under the old Act until finally the Supreme Court in *Nacirema Operating* v. *Johnson,* 396 U.S. 212 (1969), recognizing the inequity of some longshoremen being covered under the more liberal federal law, while others doing essentially the same type of work on land were not, invited Congress that if it intended to have all longshoremen fall within the purview of the Act, that it should amend the law.

Congress accepted the suggestion made by the Supreme Court in the *Nacirema* decision *supra,* and amended the law effective November 26, 1972. In addition to expanding the ar[illegible] to be covered under the new Act, it also provided for sub[illegible]tially increased benefits to be paid (at present the federal law provides almost three times the monetary benefits of New York State compensation laws). It also provided for attorneys' fees to be charged to employers in controverted claims and eliminated the unseaworthiness doctrine as a cause of action in third party claims by longshoremen. It is because of the cost incurred by the increased benefits that employers are trying to limit the effectiveness of the new Act directly contravening the intent of Congress.

At pages 10 and 11, House of Representatives Report #92-1441, the Committee of Education and Labor stated:

"The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose respon-

> sibility is only to pick up stored cargo for further trans-shipment would not be covered, nor *would purely clerical employees* whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment."

It is evident from a reading of the above that a checker with whom the claimant herein was working was specifically mentioned to be covered under the new Act and that a uniform compensation system was to be applied to employees who sometimes work on a ship and sometimes on the dock. The counter-statement of facts in this case show that the claimant does sometime work on ships and lighters, as well as on the dock. He may on occasion work stripping containers in the morning and on a lighter in the afternoon of the same day.

Nowhere in the old or new Act is there any mention of a "point of rest" theory advocated by the employer. A comprehensive research of numerous decisions rendered in connection with litigation in the compensation filed fails to reveal any mention of petitioner's theory. The application of the Act is to be liberally construed in favor of the claimant to avoid harsh and incongruous results, *Reed* v. *SS Yaka,* 373 U.S. 410 (1964); *Michigan Mutual Liability Co.* v. *Arrien,* 344 F.2d 640 (1965).

The employer, in its brief, relies on the *"Adkins, Harris,* and *Brown"* cases decided in the 4th Circuit on December 22, 1975. This was a two to one decision on the issue of jurisdiction, with a strong dissent written by Judge Craven. It has been recently learned that re-argument *en banc* has

been granted and is scheduled for some time in May, 1976. The employer also cites *Weyerhauser Co.* v. *Gilmore,* No. 74-3384, decided December 5, 1975 (9th Cir.), the facts of said case are entirely different than the case before this court. The claimant in the *Weyerhauser* case was not a longshoreman or checker. He was merely a "pondman" working in the sorting of logs afloat in a working area known as a pond. Logs from this pond were fed into a mill for processing in plywood. After the logs are processed, the finished product is loaded on a ship. The claimant in said case had no duties in connection with the dock work or loading and unloading of vessels. It is interesting to note the court's comment in the *Latter* case. The court said that

> "The claimant's membership in a non-maritime union rather than a maritime union speaks *loudly* for a joint labor-management practical and realistic construction of the nature of a pondman's work and duties as non-maritime employment."

In this case the claimant is a member of the International Longshoremen's Association, an uncontroverted maritime union, therefore this fact speaks loudly and realistically of the labor-management construction as to the nature of the employment. This court is urged to reject the *Adkins* majority decision; reject the point of rest theory, and adopt Judge Craven's opinion as the law.

POINT VI

The language of the new Act is clear, therefore there is no need to search beyond the language of the statute to establish its meaning.

It is only in those cases where the language of a statute is ambiguous and uncertain that the court may provide guide lines to its meaning and intent by resorting to legislative history to infer a narrow construction as urged by petitioner, *U.S.* v. *Hunter,* 459 F.2d 205 (4th Cir., 1972). If the language of the law itself is clear and, as in this case, where it is confirmed by the House of Representatives Report *supra,* in that it specifically enumerates a checker as a person to whom the new Act would apply and by inference the claimant who does the physical work, there is certainly no need to research the point further, either by way of legislative history or by judicial interpretation.

POINT VII

The warehouse building within the terminal area is only a temporary holding area.

In *Haggans* v. *Ellerman and Bucknall SS Co.,* 318 F.2d 563 (3 Cir. 1963), the plaintiff was a member of a gang engaged in discharging cargo of sand bags from a ship. After the bags of sand were discharged from flat cars and stacked on the warehouse floor, the plaintiff slipped on sand which had spilled from the bags. The defendant claimed that the plaintiff was merely stacking bags for transshipment. It was held as a matter of law that they were the same bags handled by longshoremen who had

started the process of the discharge of the cargo. The pier apron could not contain the large number of bags, which in any event had to be protected from weather by being placed in a warehouse. The Court concluded that the plaintiff was performing an integral part of the unloading of a vessel.

In *Spann* v. *Lauretzen* (3d Cir. 1965), 338 F.2d 205, Spann, a longshoreman was standing on the dock operating a land based hopper. A land crane was unloading nitrate from a ship by placing buckets of nitrate from the ship into the hopper. The hopper would then discharge its contents into trucks. The hopper handle fell striking a longshoreman operating the hopper. The Court held that the hopper was a temporary storage vessel to facilitate unloading, extending admiralty jurisdiction; it reasoned that the hopper was an essential instrumentality for unloading of the ship.

The *Haggans* and *Spann* cases, *supra,* therefore, establish that whether it is a warehouse (or other pier building), or a hopper, these facilities are only temporary holding areas to facilitate the unloading of ships. The unloading process does not terminate until the cargo is delivered to the consignees' truckman.

POINT VIII

The finding of the Administrative Law Judge affirmed by the Benefits Review Board constitutes a binding finding upon an Appeals Court.

Prior to the new Act, the law provided for the Deputy Commissioner to hold formal hearings and appeals from his findings and awards were made to the District Court. The new Act eliminated the District Court as an appeals court, substituted the Administrative Law Judge as the hearing officer instead of the Deputy Commissioner, and provided for an "internal" appeal within the framework of the United States Department of Labor to the Benefits Review Board, and thereafter the Circuit Court wherein the site of the accident occurred, would consider any appeal by an aggrieved party. Notwithstanding the change in the Act, the law with reference to the upholding of findings of fact made by the Deputy Commissioner now the Administrative Law Judge, as well as the Benefits Review Board, must be upheld when supported by substantial evidence, *O'Leary* v. *Puget Sound Bridge & D. D. Co.,* 349 F.2d 571 (9th Cir. 1965).

The Administrative Law Judge held that the unloading process did not end where the container hit the pier. Cargo is in maritime commerce until it is unloaded from the container and further transshipped after the container is stripped.

Applying the law as mentioned in the *O'Leary* case *supra,* since this is a question of fact and there is ample substantial evidence in the record to support the finding, it

cannot be disturbed on appeal to the Circuit Court even if the Court would make a different finding of fact upon its own review of the evidence, 33 U.S.C. 921(b)(3); *O'Keefe* v. *Smith Assoc.,* 380 U.S. 359.

POINT IX

Failure of employer to introduce evidence to negate the claim invokes the presumption under Section 920 of the Act.

33 U.S.C. 920 creates a presumption in favor of the claimant. The presumption is rebuttable, provided adequate evidence is introduced to support the employers' allegation that there is no jurisdiction, *Butler* v. *District Parking Mgt. Co.,* 363 F.2d 682 (D.C. Cir. 1966). When an employer offers sufficient evidence to rebut the presumption, only then is it possible to overcome the presumption, however, the evidence presented per se, does not control the ultimate decision, *John W. McGrath Corporation* v. *Hughes,* 264 F.2d 314 (2d Cir. 1959). The measure of proof required are facts, not speculation. *Steel* v. *Adler,* 269 F. Supp. 376 (D.D.C. 1967). Where the presumption of compensability is overcome, only then does the fact finder (Administrative Law Judge) proceed to evaluate the evidence introduced by the parties. The statutory policy places a less stringent burden of proof on the claimant than on the employer, *Strachen Shipping Co.* v. *Shea,* 406 F.2d 521 (5th Cir. 1969).

The record indicates that there is no evidence introduced in behalf of the employer which can be considered in any form or manner to rebut the presumptions under the law.

CONCLUSION

The decision of the Administrative Law Judge as affirmed by the Benefits Review Board should also be affirmed by this Court.

The employer is charged under Section 28 with the attorney's fee for the Respondent, Ralph Caputo, in the amount as fixed by this Court. A separate application for the fee request will be submitted to the Court for its consideration.

Respectfully submitted,

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SUPPLEMENTAL APPENDIX FOR RESPONDENT, RALPH CAPUTO

been stipulated, if counsel will permit me, just so we get the continuity of the record.

Mr. Caputo.

Thereupon,

RALPH CAPUTO,

the claimant, was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GUCCIARDO:

Q Mr. Caputo, will you please give your name and address for the record?

A My name is Ralph Joseph Caputo. I live at 66 Grant Street, Staten Island, Zip Code 10301.

Q Mr. Caputo, what is your occupation?

A My occupation is a longshoreman.

MR. KIMBALL: I object to the characterization, unless it is a loose one rather than a legal one.

I suppose that is what we are here to decide, whether he is or is not a longshoreman.

JUDGE ROWDER: I agree with that, and I will let him describe his activities as being a longshoreman, in that it does not determine the legal issue.

BY MR. GUCCIARDO:

Q Mr. Caputo, as a longshoreman, where do you do your work?

A Mostly in the hold of a ship, where I am naturally put at work.

Q Are you also -- do you also do terminal work?

A Terminal labor work, dock work.

Q When you work on a ship, where do you work?

A Down in the hold of the ship.

Q What do you do there?

A Unload and load pallets, we do the same with nets --

Q You load and unload a vessel from the dock?

A Yes.

Q As terminal laborer, would you describe what your duties are?

A Terminal laborer consists of the job of loading trucks, discharging, loading containers, also lighters and barges.

Sometimes, if it is necessary, they put you on the ship, which consists of ship labor, if they need you.

Q Well, when you are used as ship laborer, what do you mean by that?

A Ship laborer consists of loading for the crew and laundry.

Q Is that commonly known as ship stores?

A Yes.

Q You said as terminal laborr you worked on lighters

and barges. Are you using the same words interchangeably? Does it mean the same to you?

A A lighter is a closed one, and a barge is an open one.

Q As terminal laborer, what do you have to do with these barges and lighters?

A Sometimes we have to discharge them and sometimes you have to load them.

Q When you discharge them or load them, are they afloat adjacent to the dock area?

A They are on the water, and they are tied to the string piece.

Q And whether you are working as a terminal laborer or working on the hold of a ship or loading ship stores, or doing lighter work, what is that all called, as far as you are concerned?

A It consists of work as a longshoreman.

Q Are you a member of a union?

A Yes, sir.

Q What union?

A Local 1814.

Q What is the union called? Is it the International Longshoremen's Association?

A Yes.

Q And are all of the workers, whether they be hold

workers, terminal laborers, checkers, or lighter workers --

A They all belong to that local.

Q All belong to the --

A 1814.

Q -- the Longshoremen's Union, regardless of what local?

A Yes.

Q How long have you been so employed, did you say, for the record?

A I have been a longshoreman since 1947.

Q And since 1947 -- are you still employed as a longshoreman?

A That is right.

Q From 1947 up to the present time, the activity that you have just described, that is working as terminal laborer, working on lighters and working in the hold of a vessel, is that essentially what you do?

A That is it.

Q Do you do this work for various stevedoring companies?

A Stevedoring companies.

Q Is this essentially what is known as a Shape job?

A It is considered a Shape job when there is no job at your regular pier.

Q Well, does a Shape job mean that you go to a hiring

out by nets, we will have to have six men on the dock, sometimes you have eight men, and we use hooks to take the cargo from the net and we palletize the cargo in the pallets.

Q And by what mechanism is this pallet taken on the vessel or discharged from the vessel, as the case may be?

A As soon as we -- you see, the cargo comes out of various --

Q Let me interrupt you, Mr. Caputo. By what mechanism is the pallet taken from the dock and put on the ship, and vice versa?

A By the boom of the ship, the ship's cable.

Q Ship's equipment?

A Yes.

Q Now, when there is no work for you in your regular gang, how do you obtain work?

A I obtain work by going up to the hiring center at Sixth Street and Third Avenue in Brooklyn.

Q Who maintains this hiring center?

A It is run by the Waterfront Commission.

Q Are all of the men who work on the waterfront required to go to this hiring hall in order to be hired?

A Just longshoremen and carpenters at the hiring center.

Q When you say carpenters --

A That is right.

MR. GUCCIARDO: Not yet, Your Honor. I will get to it.

JUDGE HOWDER: I would like you to finish up with this line and move in on what he was doing the particular day when the accident occurred.

MR. GUCCIARDO: Okay.

BY MR. GUCCIARDO:

Q This cargo, where did you say it came from, the Yugoslav ship?

A Yes.

Q Now, as far as you know, is all of the cargo in that terminal -- I am sorry, I think you stipulated to that, so I don't have to go into that point.

Mr. Kimball, is that correct? That all the cargo on that pier either comes off a vessel or is going on a vessel?

MR. KIMBALL: That is true.

MR. GUCCIARDO: All right, I will skip that.

BY MR. GUCCIARDO:

Q When you are assigned as terminal laborer, if your truck work of loading the truck is finished, could you be assigned to unloading a lighter if there is a lighter available?

A Yes.

MR. KIMBALL: Objection.

my objection to the relevancy of this testimony?

JUDGE HOWDER: Yes, I do, and I will give it ve serious consideration.

BY MR. GUCCIARDO:

Q Will you answer the question, please?

A I believe about twenty percent.

Q Twenty percent what? On the ship or on the dock? On the barges or on the dock?

A On the lighters.

Q On the lighters. Now, on the day that you were injured, April 16, 1973, were you physically located within the terminal area commonly known as 39th Street, Brooklyn?

MR. KIMBALL: That has been stipulated.

We have a stipulation which I think even Mr. Justice Cardozo has characterized as the highest form of proof.

Now, a question which elicits testimony from this witness about which we have already stipulated, I don't know how to deal with.

Suppose he testified something contrary to the stipulation, then where are we? We either have stipulations or forget about testimony in that area. I don't want it both ways, because it makes me nervous.

JUDGE HOWDER: Mr. Kimball, has he testified contrary to your knowledge so far?

BY MR. GUCCIARDO:

Q Could you also be assigned to loading ship stores?

MR. KIMBALL: Objection.

THE WITNESS: Yes, sir.

BY MR. GUCCIARDO:

Q Have you ever loaded ship stores for this particular Northeast Marine Company?

A Yes, sir.

Q How many times would you say you have loaded ship stores for this company?

A I average around seven times.

Q What do you mean seven times, over what period of time?

A Within a period of about seven to ten years.

Q When you load ship stores, what do you do specifically? Will you advise the Judge?

A Well, the ship stores, we bring the cargo to the storerooms.

Q On board a ship?

A On board ship.

Q And you take the cargo from where, the dock?

A From the dock.

Q Now, if your assigned work of loading a truck is finished, can you also be assigned to a lighter?

A Certainly.

you make. It has been stipulated, and I will accept that.

I would ask you to be careful in asking questions in this area.

BY MR. GUCCIARDO:

Q Do you know who owned this truck that you were loading?

A Tomaselli Brothers.

Q They had nothing to do with Northeast Marine, as far as you know?

A No.

Q Was the truck phycially located within the terminal area when you were injured that --

MR. KIMBALL: That has been stipulated, and it was shown on Respondent's Exhibit 1.

MR. GUCCIARDO: The question is withdrawn.

JUDGE HOWDER: The question is withdrawn.

BY MR. GUCCIARDO:

Q Now, will you state briefly what you were doing when the accident happened, and how it occurred?

A My checker called me and told me to go out to the Tomaselli truck --

Q Let me interrupt you a minute. What is the function of a checker?

A A checker, he is a man who checks the cargo, counts how many pieces are on the pallet that goes inside

the truck. They bring it to the truck, and in doing so the driver and I waited. The first draft came to the truck and the driver and I were standing by the pallet, and in doing so we got a clearance of the dolly, and he told him to put the load down on the dolly, and in doing so --

Q The machine driver is a hi-lo driver?

A Hi-lo driver.

Q Is he lifting the pallet, the draft?

A The draft that landed on the dolly. Now, at times we have to ask the machine driver to give us a little push. Sometimes the trailer is forty-foot, sometimes they are 45-foot. So we told the driver, and he says, All right, I will give you a push. He gave us a push, and he was pushing the dolly down to the rear of the trailer. I happened to be on the righthand side. The driver was on the lefthand side. In doing so, I was going back, back, back, I figured that the floor was level, not knowing that there was a backstop. In doing so, I fell backwards, and in doing so my left foot went under the bottom of the dolly. My right foot was clear because there was enough space of the draft --

Q Were you injured?

A Yes, sir.

Q Did you stop work immediately?

A I stopped work immediately.

Q What time was this, about?

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Joseph Boselli , being duly sworn, deposes

and says, that on the 30th day of April 19 76 , at 12 o'clock NOON

M. he served the annexed Brief for Respondent & Supplemental Appendix No: 76-4009 in Re: Ralph Caputo & Director, Off. of Workers' Compensation Progs. v. Northeast Marine Terminal Co., Inc. and State Insurance Fund, Carrier,

upon William Kilberg

Esq(s)., Attorney(s)

for Respondent

by depositing 2 true copies

thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station, New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at (his/their) office

Solicitor of Labor
Attorney for Director, Office of
Workmens' Compensation Programs
200 Constitution Ave., N.W.
Washington, D.C. 20210

that being the address designated in the last papers served herein by the said attorney.

Joseph Boselli

Sworn to before me this 30th

day of April 1976

John Alusick

JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 1978